

ST 97-50

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE, Responsible Officer of
XYZ CORPORATION,
Taxpayer**

**No.
NPL:
IBT No.**

**Charles E. McClellan
Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Alan Osheff for the Department of Revenue. Michael H. Moirano, of Nisen & Elliott, for the Taxpayer.

Synopsis:

This matter involves a Notice of Penalty Liability ("NPL") issued to JOHN DOE, ("DOE"), by the Department for the liability of XYZ CORPORATION, for the periods August 1985 through November 1990. DOE filed a motion for summary judgment that was withdrawn on September 21, 1996, at a status conference, that the parties agreed to conduct as a pre-trial hearing. A pre-trial order was entered on that date stating that the sole issue to be decided is whether DOE is liable for taxes owed by a corporation called XYZ CORPORATION ("XYZ").

An evidentiary hearing was held on February 5, 1997. At the hearing the parties stipulated to the cancellation of the liability assessed against DOE for the periods August

1, 1985 through December 31, 1987 and August 1, 1988 through November 1990. As a result, the only period at issue is the period from January 1, 1988 through July 31, 1988. Also, pursuant to stipulation, presumably as a stipulation of facts, the parties entered into evidence DOE's motion for summary judgment as Joint Exhibit No. 1.

My recommendation is that NPL 3241 be canceled.

Findings of Fact:

1. NPL 3241 was issued to DOE on April 21, 1994, upon receipt of which, he filed a timely request for hearing. Joint Ex. No. 1, ¶ 1.

2. The NPL concerned taxes assessed against DOE's former employer, XYZ ("XYZ") under the Illinois Telecommunications Excise Tax Act. 35 ILCS 630/1 *et seq.* *Id.* at ¶ 2.

3. XYZ first employed DOE on January 12, 1988, when he was elected president, and treasurer. *Id.* at ¶ 3.

4. DOE resigned from XYZ thirteen months later on February 4, 1989. *Id.* at ¶ 4.

5. During DOE's tenure as president and treasurer, XYZ was an "alternative operator service." *Id.* at ¶ 5.

6. As an alternative operator service, XYZ contracted with phone aggregators (*i.e.*, hotels, private pay phone companies, hospitals, *etc.*) to provide long distance service to their customers who were using telephone calling cards or making collect, third party or person to person calls. *Id.*

7. XYZ billed all calls placed through XYZ through independent clearinghouses, which had billing agreements with the various Bell Operating Companies (“BOCs”) and Local Exchange Carriers (“LECs”). *Id.* at ¶ 6.

8. XYZ would transmit its call records (*i.e.*, call type, duration, cost, *etc.*) to the clearing house, which in turn transmitted the information in the required format to the BOCs and LECs which would then add the appropriate federal, state and local taxes and bill the call to the person placing the call on the caller’s monthly telephone bill. *Id.* at ¶ 6.

9. Proceeds from these billings, including the taxes, were then remitted back to the clearinghouses which would then remit the taxes to the appropriate governmental agencies, deduct their fees, and pay the balance to XYZ. *Id.* at ¶ 6.

10. XYZ began to provide alternative operator services in October 1987 when it became an associate of two clearing houses, ABC CLEARING HOUSE (“ABC”) and 123 CLEARING HOUSE (“123”). *Id.* at ¶ 7.

11. The portion of the assessment for the period at issue is \$2,187, which the auditor calculated on income of \$43,743 from January, February and March of 1988. Joint Ex. No. 1.

12. The parties stipulated that during the period at issue ABC collected the Illinois telecommunications tax and remitted it directly to the Department. Joint Ex. No. 1 at ¶ 12, Ex. E. p.41.

13. At the time the Department’s auditor did the audit, XYZ was no longer in existence, so he based his deficiency calculation on the gross receipts reported on XYZ’s federal income tax return for the period July 1, 1986 through June 30, 1987. Joint Ex. No. 1, Ex. E pp. 26 - 30.

14. Subsequent to the audit and prior to the hearing the Department's auditor died. Tr. pp. 9, 14.

15. The gross receipts upon which the auditor based his assessment were not derived from providing telecommunication services; rather, they were fees received by XYZ for software design services rendered to various customers. Tr. at pp. 32 – 38.

Conclusions of Law

THE ISSUE IN THIS CASE IS WHETHER DOE IS A RESPONSIBLE PERSON WHO WILLFULLY FAILED TO FILE AND PAY RETAILERS' OCCUPATION TAXES FOR XYZ AS REQUIRED BY STATUTE. ONCE THE DEPARTMENT INTRODUCED INTO EVIDENCE THE NPL UNDER THE DIRECTOR'S CERTIFICATE (DEPT. EX. NO. 1), ITS PRIMA FACIE CASE WAS MADE. BRANSON V. DEPT. OF REVENUE, 168 ILL.2D 247 (1995); 35 ILCS 735/3-7. THE BURDEN THEN SHIFTED TO DOE TO OVER COME THE DEPARTMENT S CASE. BRANSON AT 261. THE RECORD SHOWS THAT HE HAS SUCCEEDED.

Because of the stipulations of the parties, the only liability left at issue is the liability assessed against XYZ for the period January, February and March of 1988. This liability was eliminated when the parties stipulated that it was paid by ABC. Therefore, the NPL issued to DOE should be canceled.

WHEREFORE, I recommend that NPL XXXX be canceled.

December 22, 1997

ENTER:

Administrative Law Judge